IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Petitioners,*

v.

JOSEPH CARROLL, ET AL., *Respondents.*

No. 310

JOSEPH CARROLL, ET AL., *Petitioners,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF MUSICIANS, ET AL.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. 180) is reported at 372 F. 2d 155. The opinion of the District Court for the Southern District of New York (App. 124) is reported at 241 F. Supp. 865.

JURISDICTION

The judgment of the Court of Appeals (App. 207) was entered on January 30, 1967. In accordance with orders of Mr. Justice Harlan extending the time for filing (App. 208, 209), the petitions for writs of certiorari in No. 309 and No. 310 were filed on June 29, 1967. On October 9, 1967, this Court granted the respective petitions for writs of certiorari and consolidated the two cases for oral argument (App. 210). The Chief Justice and Mr. Justice Marshall took no part in the consideration or decision of these petitions. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In No. 309 the following questions are presented:

1. May union regulations, designed to preserve employee job and wage standards, be denied the labor exemption to the antitrust laws, although the union has not combined with any non-labor group in their enforcement?

2. May union regulations, which preserve employee wage standards by establishing the minimum compensation which an employer must receive for work performed in competition with its members, be declared unlawful under the Sherman Act on the theory that they deal with a non-mandatory subject of bargaining?

In No. 310, plaintiffs-petitioners raise twenty-seven separately numbered questions presented. We believe, however, that of the questions raised only the following

are presented by the portions of the judgment below adverse to plaintiffs:

1. Do defendants violate the Sherman Act by compelling orchestra leaders to become members?
2. Do union regulations imposing minimum employment quotas violate the Sherman Act?
3. Is the failure of a union to bargain collectively in the club-date field a violation of the Sherman Act?
4. Does the enforcement of closed shops by unions violate the Sherman Act?
5. Do unions violate the Sherman Act by protecting local workers from competition of workers coming from other jurisdictions?
6. Do plaintiffs have standing to challenge defendants' regulations of booking agents? If so, do these violate the Sherman Act?
7. Do defendants combine with caterers in violation of the antitrust laws?
8. Is there a class of orchestra-leader-employers within the meaning of Rule 23 FRCP?

STATUTORY PROVISIONS INVOLVED

These cases involve § 1 of the Sherman Act, 26 Stat. 208, 15 U.S.C. § 1; §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. §§ 17 and 29 U.S.C. § 52; and §§ 4 and 13 of the Norris-LaGuardia Act. 47 Stat. 70 and 73, 29 U.S.C. §§ 104 and 113. These are reprinted in pertinent part in the Appendix hereto, pp. 72 *infra*.

STATEMENT OF THE CASE

INTRODUCTION

This is an action under the Sherman Antitrust Law, 15 U.S.C. §§ 1 et seq.,[1] against two labor unions, the American Federation of Musicians of the United States and Canada (AFL-CIO), its New York affiliate, Associated Musicians of Greater New York, Local 802, and their officers.[2] The plaintiffs presently in the case are four professional musicians, each of whom was a member of Local 802 and the Federation at the time the suit began.[3] The unions represent professional musicians on all forms of musical engagements. In the music industry, the distinction is sometimes made between single engagements, which are engagements gen-

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[1] The joint appendix printed for this court will be referred to by the designation "App." followed by an arabic numeral (e.g., App. 102).

The numbered volumes of the appendix to plaintiffs' brief in the court below (large white volumes) will be referred to by the designation "App." followed by a roman numeral and an arabic numeral (e.g. App. I-101).

Appendix to defendants' brief in the court below (blue volume) will be referred to by the designation "App." followed by an arabic numeral with the suffix b (e.g. 353b).

The references in the District Court's Findings of Fact are to the stenographer's minutes of the trial. Quoting those findings in this brief, we shall omit those references and references to the exhibits.

[2] The District Court found there is no evidence that any of the officer defendants committed, as individuals, any of the acts complained of. (Finding No. 22, App. 128). For this reason, we shall use the term "defendant" herein as referring solely to the defendant unions.

[3] Subsequently, plaintiffs Peterson and Carroll were expelled from the Federation for reasons unrelated to this lawsuit. See Findings 4 and 5 of the District Court (App. 125-126).

erally for one day, but always for less than one week, and all others which are known as steady engagements. (Finding 24, App. 128). While the trial in this case covered other areas of the music industry as well, the practices challenged by plaintiff are mainly in what is known as "club date" engagements, which are social engagements such as weddings, confirmations, and commencements. (Finding 25, App. 128-129). Normally, the purchaser of the music (the father of the bride, organizational social chairman, etc.) approaches a musician with a request for a specified number of instrumentalists at a particular time and place. This musician thereby becomes the "leader", who obtains the other musicians who perform the engagement. (App. 186). When the leader performs himself, he conducts the musicians and usually also plays an instrument. (Finding 43, App. 132) When the leader does not perform the engagement himself, the identical leading functions are fulfilled by a subleader (Finding 36, App. 131), and his instrument is played by the subleader or a sideman (Finding 45, App. 132). The plaintiffs are primarily orchestra leaders in the "club date" field, although all have performed from time to time in other areas of the music industry.

The trial court identified the various activities of defendant unions which were the subject of plaintiff-leaders' antitrust charges as follows: (App. 160:)

> "(1) pressuring orchestra leaders into the union;
>
> "(2) imposing minimum price regulations on orchestra leaders;
>
> "(3) imposing minimum numbers of sidemen requirements on orchestra leaders;

"(4) requiring the use of the Form B Contract;

"(5) imposing restrictions on traveling orchestras;

"(6) failing to bargain collectively;

"(7) regulating booking agents and caterers;

"(8) monopolizing the music industry."

We shall first set forth the facts relating to each of the above charges and shall then describe more generally employment relationships in the musical field. Except as expressly noted, our statement will be based on the undisturbed findings of the District Court.

THE FACTS

A. Employment Relationships in the Music Industry

1. Music Industry Generally

Members of the unions perform services as orchestra leaders, subleaders and sidemen on club dates and for hotels, restaurants, night clubs, recording companies, broadcasting companies, theatres, steamships, operatic and philharmonic societies (Finding 26; App. 129). Musicians do not confine their activities to any one musical field. They seek engagements wherever job opportunities exist (Finding 29; App. 129-130).

> "Thus, musicians who perform services as orchestra leaders, subleaders and sidemen in the club date field also perform services in non-club date field. * * * Conversely, musicians who perform in the non-club date fields also work as leaders, subleaders, or sidemen in the club date field when they are not otherwise engaged".

2. Interrelationship Between Leaders and Sidemen

Leaders, other than Peterson, when they personally appear at engagements invariably play musical instruments (Finding 43; App. 132). Thus Cutler plays the saxophone and Carroll the drums (Finding 42; App. 132). The leaders' witnesses testified that an orchestra leader, in playing an instrument, fills a requirement for an instrument in the orchestra just as any sideman does (Finding 44; App. 132). Based upon this undisputed testimony confirmed by the witnesses of plaintiff leaders, the District Court found (Finding 45; App. 132):

> "Each time plaintiffs play instruments in the hotel steady or club date field they displace the services of a sideman who otherwise would have been engaged to play the same instrument that the particular plaintiff played."

Plaintiffs concede that sidemen are employees (Finding 40; App. 131). Thus, in playing instruments leaders perform functions identical with those of acknowledged employees—sidemen—who are also union members.

3. Interrelationship Between Leaders and Subleaders

Plaintiffs regularly use subleaders for their engagements. They do so when they accept simultaneous engagements for more than one orchestra. The subleader performs all the musical services which the leader would have performed had he been present (Finding 36; App. 131).[4] Sub-leaders are admittedly employees (Finding 37; App. 131).

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[4] Thus Cutler testified (App. 373b):

> "Q. You mentioned before that you have certain employees whom you use as sub-leaders. What is the function or role of a sub-leader in an engagement? A. Obviously someone

Plaintiffs and their own witnesses testified that when an orchestra leader personally conducts an orchestra he displaces the services of a subleader who would otherwise have been engaged to conduct the orchestra (App. I-305-06, 351-52, III-757-60, 829, 66b, 70b, 78b-79b, 81b, 82b, 373b-374b). On the bases of this and other evidence, the District Court found (Finding 38; App. 131):

> "Each time plaintiffs personally conduct an orchestra in the hotel steady and club date fields, they displace the services of a subleader who would otherwise have been engaged to conduct the orchestra."

The uncontradicted evidence also showed that plaintiff "Levitt actually did lead a band at a steady engagement at a dance hall for which he received less than the subleader's union minimum wage" (App. 164). Judge Levet referred to the wage cutting by Levitt after observing (App. 164) that "if they [leaders] undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards."

4. Interrelationship Between Leaders and Sidemen Who Occasionally Lead in the Club Date Field

There is a high degree of interchangeability in work functions among orchestra leaders, subleaders and

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has to be in charge, someone has to call the tune, someone has to be rseponsible, someone has to contact the purchaser of the music and get his wishes and find out where the musicians are to stand or play, whether they will be fed and all those things, and then he stands there as a part of the orchestra and he calls out the tunes that are to be played and he tells them in what tempo they are to be in. *He exercises all the functions I would exercise if I were there*" (emphasis supplied).

sidemen in the club date single engagement field. On the same day or during the same week, a musician may act as a leader, subleader or sideman at different engagements (App. 384b, 393b, 395b-396b). For example, 50.3% of all members of Local 802 who performed services as sidemen in the club date field during the month of December 1961 also acted as orchestra leaders in the club date field during the year 1961 (Ex. K; App. 398b). Again, 50% of plaintiff Levitt's sidemen acted as orchestra leaders during 1960-64 (Exc. DM, LR; App. 491b). In fact, the vast majority of Local 802's members who act as orchestra leaders do so only occasionally; they are primarily sidemen.

5. The Status of Leaders as Employers or Employees

One of the most thoroughly litigated issues at the trial was the employment status of leaders. It was the defendant unions' position that orchestra leaders are not employers, but are rather the employees of the purchaser of the music. Plaintiffs contended that they, and leaders who operate as they do, are employers. They did not contend that *all* leaders are employers until after trial; indeed, they stipulated that "Conducting is a musical service and orchestra leaders when conducting, perform the same type of work whether they are 'employers' (for any purpose) or 'employees' ". (Finding 32; App. 130).

The evidence at trial dealt with the employment relationships in the club date field, at hotels, restaurants and night clubs, and in radio and television broadcasting and recordings. The trial court made elaborate findings regarding the employment relationships in broadcasting and recording and determined therefrom that the leader is the employee of the broadcasting and

recording companies. He deemed it unnecessary to make findings or draw conclusions regarding the leaders' status in the club date field or on steady engagements in hotels, restaurants and night clubs (App. 163).

B. The Union Activities and Regulations Attacked by Plaintiff-Leaders

There is no evidence that the challenged activities were part of a conspiracy to create a business monopoly or to control the marketing of goods or services. On the contrary, there were findings by the trial court (App. 167, 170-171) and affirmative proof that the unions acted independently in their self-interest to prevent destruction of minimum wages, working conditions, and terms and conditions of employment of their members.

1. The Alleged Pressuring of Orchestra Leaders Into the Unions

In the non-club date field the collective agreements negotiated by the unions contain union shop provisions similar to those contained in thousands of collective agreements made by International and local unions in accordance with the provisions of Section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3). In the club date field, where there are no collective agreements, the unions do not permit members to play in the same orchestras with nonmembers (Finding 127; App. 156). However, in the case of leaders Carroll and Peterson, who were expelled from the union, the unions permit members to perform for them so long as Carroll or Peterson do not conduct or play an instrument. Judge Levet found that when they so operate "the union does not significantly hinder them from carrying on their business in this fashion

[and] [i]nsofar as they do not themselves conduct or play the charge of pressuring them into the union has not been sustained." (App. 168).

2. Imposing Minimum Price Regulations on Orchestra Leaders

Local 802 and other AFM locals set minimum wages for the sidemen and leader. (Finding 74, 80; App. 140-141, 142). Local 802 requires the leader to charge the purchaser the aggregate of the minimum compensation established for sidemen and leaders.[5] (Finding 79; App. 142). The same minimum prices must be received by employer-leaders and employee-leaders alike (Findings 74, 75; App. 140-1).

The minimum wages which must be paid to sidemen vary with a number of factors, including "the type of engagement involved; the number of hours played; whether the sideman plays more than one instrument," etc. (Finding 73; App. 140). Sidemen must also receive expenses for food, lodging, clothing, travel, etc. (App. I-65-66; Ex. CI, p. 24-25).

Each orchestra leader must receive as his minimum scale compensation a basic fee which will vary from 25% to 100% above the wages payable to sidemen, depending upon the number of musicians playing the engagement (Finding 74; App. 140-141). The orchestra leader must also be paid as part of his minimum scale compensation on club dates a sum equal to 8% (it was initially fixed at 7%) of the scale wages of the

[5] Local 802's minimum wages and minimum prices in the club date field are established either by the members of Local 802 at a so-called Price List Meeting, or, if a quorum of members is not present, then by Local 802's Executive Board pursuant to a standing resolution in the bylaws granting them such authority. (Finding 81; App. 142-143).

leader and the sidemen. The purpose of the 8% is to reimburse the orchestra leader for his out-of-pocket expenses for social security, unemployment insurance and bookkeeping (Stipulated Facts 21, 22, 23; App. 105-106).[6]

Where the leader does not himself perform but uses a subleader, he must pay the subleader out of his compensation, a minimum wage which will vary from 1⅛ times to double the sidemen's scale depending upon the number of men in the orchestra and whether or not there is a rehearsal or show (Stipulated Facts 24, 25, 26; App. 106-107).

The testimony of a number of witnesses (including witnesses called by appellants) was that when a leader receives less than union scale from the purchaser, the sidemen invariably receive less than scale wages (App. IV-1198-1199; 44b, 60b-61b; 245b). There is thus a direct relationship between the price charged the purchaser and the minimum wages received by musicians. It was in view of this relationship between prices and minimum wages that Judge Levet observed (App. 168-169):

> "Any cuts by participating leaders of their fees below union minimums or in the price of an engagement below a union minimum equalling the total minimums of the participants put an obvious downward pressure on the wages of subleaders and sidemen."

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[6] At the time the percentage was 7% a pamphlet issued by Local 802 in 1949 set forth the "reasons why orchestra leaders are required to receive the aforementioned additional sum of 7%, now 8%, of sale" (Stipulated Fact 22; App. 105). The percentage was increased to 8% because of the increase in social security taxes (Ex. DE, pp. 39, 76).

3. The Requirement That Leaders Use a Minimum Number of Musicians

The unions have been continuously faced with acute unemployment. Since 1951 Local 802 has required the employment of a minimum number of musicians on club dates performed in various ballrooms in the City of New York (Finding 84; App. 143-144). These regulations were adopted after complaints were made by members that the number of musicians employed on club dates was being inordinately reduced and that there were occasions on which as few as three musicians would perform for affairs at which two or three thousand people were present (App. 315b-317b). They are challenged here by plaintiff.[7]

4. Federation Regulations Requiring the Use of the Form B Contract

AFM does not allow its members "to sign any form of contract or agreement for an engagement other than that issued by the A.F. of M." (Finding 86; App. 144). This contract is known as the Form B contract. It designates the purchaser of the music as the employer, and vests in him the right to control the services of the musicians (App. 19).

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[7] Local 802 has also obtained additional employment for musicians by persuading the City of New York to sponsor live musical programs at parks, schools and hospitals at a cost to the City of approximately $50,000 to $80,000 per annum (App. II-661-64). Defendants have also sought to stabilize employment by entering into collective agreements with television networks, Radio City Music Hall, the New York Philharmonic-Symphony Society, the Metropolitan Opera Association, and certain legitimate theatres which specify the minimum number of musicians to be employed (Exs. BL1-4, CH, BS, and CB). AFM has also secured the employment of additional musicians by providing in collective agreements with recording companies and motion picture producers for the payment of sums aggregating approximately $5 million per year into a Music Performance Trust Fund used to furnish live music for various public and charitable functions (Exs. FQ, FG).

The Federation's by-laws provide that before each engagement the leader must submit the contract to the local in whose jurisdiction the engagement is being played, or in its absence a written statement defining the conditions under which it is to be performed, including *inter alia* the amount contracted for, the names of the individual sidemen, and the amount of money paid each of them. (Finding 86; App. 145).

5. Restrictions on Traveling Musicians

For many years, the by-laws of the Federation have required that there be a higher wage on traveling engagements. Article 15 of the bylaws provides as to traveling engagements that the "minimum wage to be charged and received by any member" shall be "no less than either the wage scale of the local in whose jurisdiction the services are rendered or the wage scale of the home local of the member performing such services, whichever is greater, plus 10% of the wage scale of the local in whose jurisdiction the engagement takes place. (Finding 99; App. 146-147).

Judge Levet found (Finding 100; App. 147), and the undisputed evidence showed (App. IV-1356-57, 1367-68) that:

> "The purpose of the traveling engagement wage differential is to protect work opportunities for local musicians within their respective local union jurisdictions."

Federation's by-laws also restrict the right of traveling members to solicit engagements outside of their home locals. These restrictions are set forth in Findings 105-114 (App. 148-150) of the District Court to which we respectfully refer this Court.

6. The Alleged Failure to Bargain Collectively

The unions do not bargain with leaders or users of music in the club date single engagement field (Finding 123; App. 153). They do bargain in the non-club date fields. (Finding 124; App. 153). Those employers with whom they have collective agreements include, among others, phonograph recording companies, radio and television broadcasters, television film producers, television videotape producers, motion picture producers, television videotape producers, motion picture producers, nontheatrical, documentary and industrial film producers, electrical transcription producers, theatres, steamship companies, Radio City Music Hall, Metropolitan Opera Association, Philharmonic-Symphony Society of New York, New York City Opera, New York City Ballet, hotels, restaurants, and ballrooms (Finding 124; App. 153).

7. Regulating Booking Agents and Caterers

(a) *Booking Agents*

The intense competition for jobs among musicians during the depression gave rise to a number of abuses by booking agents, who secure engagements and contracts for musicians. In particular, many booking agents charged exorbitant fees and frequently booked engagements below union scale (Finding 118; App. 151). The situation was described in the President's Report at the Federation's 1936 Convention.

Following that report, the Convention adopted a resolution requiring all booking agents to enter into standard forms of license agreement under which the agent agreed not to charge more than a 10% commission on steady engagements, or more than a 15% com-

mission on single engagements, not to book non-union musicians, and not to book orchestras for less than union scale wages or working conditions.[8] No charge is made for the license. (Finding 116-119; App. 150-151)

Subsequent to the adoption of the regulations governing booking agents, the abuses were, to a large extent, eliminated. (Finding 119; App. 151).

(b) *Caterers*

Many engagements in the club date field take place in catering halls which are rented by purchasers of music. The catering halls furnish food and drink but as a rule do not supply orchestras. However, some proprietors of catering halls recommend particular orchestras to prospective purchasers (Finding 120; App. 151).

For the past 15 years a standing resolution in Local 802's bylaws has provided (Finding 121; App. 152):

> "A. Caterers, banquet managers and others connected directly or indirectly with halls, hotels and all similar establishments which provide facilities for public or private functions, are prohibited from engaging leaders or musicians, for such affairs.
>
> * * *
>
> "C. The payment or promise of payment, or any gift or consideration whatever, to the above is

[8] Similar license agreements are utilized by many other unions in the entertainment field, such as the American Guild of Variety Artists, the American Federation of Television and Radio Artists, Actors Equity, and the Writers Guild (App. I-195-96, 16b-17b, 62b).

> contrary to the principle of fair competition among members of this local, and any member guilty of such offense shall be fined not more than Five Hundred Dollars ($500.00) or suspended, or both."

The resolution was adopted after an extensive investigation of abuses by caterers. One of the reports of the investigating committee stated (Finding 122; App. 152-153):

> "The objective of this committee's important assignment can be stated simply: the elimination of the caterer from the music business and the restoration to the musician of his right to earn a living without any restrictions and pressures upon him. Your committee believes, and knows that in that belief it reflects the unanimous opinion of the membership, that all money spent for music should go to musicians and not to chiselers. We oppose any caterer booking orchestras because that obviously leads to a depressing of union scales. The caterer must be barred from compelling people to use a specific orchestra."

Based upon the foregoing undisputed evidence the trial court found (App. 175):

> "The evidence discloses that caterers took advantage of their position before the union adopted its regulations to, in effect, book orchestras and they continue to do so, at least to some extent. Caterers recommend orchestras to customers and receive commissions from orchestra leaders. These practices actually or potentially affect the wages of the musicians involved."

THE PROCEEDINGS BELOW

1. The District Court

This case arises out of two separate complaints under the antitrust laws filed on July 29, 1960 and December 15, 1960 respectively. Of the original plaintiffs only Joseph Carroll and Charles Peterson remain in the case; two others, Ben Cutler and Marty Levitt were allowed to intervene before trial. The complaint alleged that the suit was brought as a class action under rule 23 of the Federal Rules of Civil Procedure, but the District Court ultimately rejected that claim and treated the action "as affecting only the actual parties". (App. 160).[10]

Following a lengthy trial, the District Court on May 17, 1965, issued its decision dismissing the complaint in its entirety. The Court made comprehensive findings carefully annotated to the transcript of the trial record and the stipulations of the parties.

The Court introduced its discussion of the antitrust issues by pointing out that under *Allen Bradley Co.* v. *Local 3, I.B.E.W.*, 325 U.S. 797, the "unions could not, 'consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services'. *Id.* at 808". (App. 161). It then examined prior decisions of this Court to determine the meaning of the term "non-labor group" and concluded that the criterion used in the decisions "was the presence of job or wage competition or some other economic interrelationship affecting

[10] On May 22, 1961, the complaints were consolidated and joined with two other cases (not arising under the antitrust laws) brought by the original plaintiffs. However, by stipulation, the issues in the other two cases were tried first and the record there made incorporated in this case.

legitimate union interest between the union members and the independent contractors". (App. 162). The trial judge noted that if such economic relationships existed "the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." (App. 162).

Thus, in the District Court's view:

> "The ultimate issue in determining whether a relationship exists which would exempt conduct complained of from the Sherman Act is whether the work functions performed by the independent contractors actually or potentially affect the hours, wages, job security or working conditions of the union members in the same industry. If so, the union may combine with the independent contractors by including them in the union and subjecting them to union regulation." *Los Angeles Meat Drivers Union* v. *United States, supra; United States* v. *Fish Smokers Trade Council, Inc., supra* at 234. (App. 162).

Finding that the leaders were in competition with employee members of the union regarding jobs, wages and other working conditions, he concluded that they comprised a labor group. (App. 163). On the basis of those findings of job and wage competition, the trial judge determined that, under *Meat Drivers* v. *United States,* 371 U.S. 94 and *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.,* 311 U.S. 91, it was lawful to compel them to join the unions. (App. 168). Turning his attention to the legality of the price lists, he concluded that, "In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices

equal to the total minimum wages of the sidemen and the participating leader." (App. 168). Finally, finding no evidence in the record to indicate that the price lists were established as part of a conspiracy with "non-labor groups to create business monopolies and control the marketing of goods and services", he declared *Allen Bradley Co.* v. *Local 3, I.B.E.W.*, 325 U.S. 797 to be inapplicable. (App. 170-171).

The District Court also considered and rejected plaintiffs' allegations that defendants violated the Sherman Act by refusing to bargain collectively, imposing minimum employment quotas for certain engagements, requiring leaders to use the Form B contract, and regulating booking agents and caterers. (App. 171-177).

2. The Court of Appeals

Although plaintiff-leaders challenged some of the District Court's findings of fact, the Court of Appeals did not express disagreement with any of them.[11] With a single exception, which is the subject of Case No. 309, the Court affirmed the dismissal of the complaint.

Of particular significance is the Court's rejection of the leaders' contention that they could not be required to be union members:

> "Even those orchestra leaders who, as employers in club dates, lead but never perform as players,

[11] There are, however, two or three statements of fact in the Court of Appeals' opinion which are not based on the findings and which are contrary to the record. One of these, which the Court of Appeals thought to be material, is described at p. 53, *infra*. The Court of Appeals stated that most leaders employ booking agents. This simply is not so. Nor does the union operate a hiring hall.

> are proper subjects for membership because they are in job competition with union subleaders; each time a non-union orchestra leader performs, he displaces a 'union job' with a 'non-union job.'" (App. 202)

Similarly, the Court found where the leader performs,

> ". . . the services of a sub-leader would not be required and the leader may in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader." (App. 199).

However, the Court held that it was unlawful for the unions to fix the minimum price which the leader must charge to the purchaser of the music in the club-date field even where the leader performs. It agreed with the District Court that the unions had not conspired with a non-labor group to fix prices, and thus rejected the leaders' principal contention—that the unions' conduct came within *Allen Bradley Co.* v. *Local 3, I.B.E.W.*, 325 U.S. 797, and *Mine Workers* v. *Pennington*, 381 U.S. 657. (App. 195). However, the Court decided that the price regulations were invalid under *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676.

It noted that here "the unions' protective provisions do not, as in *Jewel*, appear in agreement with employers" (App. 196), but are instead adopted unilaterally by the unions. But it held that *Jewel* applied nonetheless because the "policy considerations are, however, the same" (*Id.*). It was the majority's view that *Jewel Tea* held an agreement is protected by the labor exemption to the antitrust laws only if it deals with a mandatory subject of bargaining. On that assumption,

and bearing heavily on the fact that petitioners' regulations governed "prices", the Court held that they did not deal with a mandatory bargaining subject but rather constituted price-fixing, and were a *per se* violation of the Sherman Act.

Judge Friendly dissented, saying *inter alia* that it "would be a serious misunderstanding" to read *Jewel* as holding that only union agreements on mandatory subjects of bargaining are exempt from the antitrust laws. "Where, as here, the union rule merely sets a floor under the price at which one union member may sell his services to customers in competition with other, the union needs no special justification as it did in *Jewel Tea* for regulating what would ordinarily be management prerogatives of independent business men employing union members." (App. 206).

SUMMARY OF ARGUMENT

I

Both courts below found the protesting orchestra-leaders to be in job and wage competition with employee-musicians. Under the consistent holdings of this Court, the existence of such competition is the "crucial determinant" of the legality of union attempts to regulate the competitive activities of such orchestra leaders be they considered employers or independent contractors. Since the economic objective of the unions in the present case was to control this job and wage competition by the leaders, the unions' activities did not violate the antitrust laws.

This Court has considered union regulations of working employers in many different contexts. Whatever the context, however, the Court has predicated its conclusions on the ultimate economic reality underlying the union's conduct. Whether the question before

the Court was the applicability of antitrust sanctions to union picketing aimed at ending the vendor system, *Milk Wagon Drivers', etc.* v. *Lake Valley Farm Products,* 311 U.S. 91, the scope of the preemption doctrine in a state antitrust action attacking a collective bargaining provision that required the payment of a fair rental to owner-operators, *Teamsters Union* v. *Oliver,* 358 U.S. 283, or the effect of the Norris-La Guardia Act on a lower court's order that a union expel a group of grease peddlers from membership, *Meat Drivers'* v. *U.S.,* 371 U.S. 94, this Court has probed the ultimate economic objective of the unions' actions. Invariably this Court has determined legality or illegality on the basis of whether there was job and wage competition from working employers.

In the recent decision of *Meat Cutters* v. *Jewel Tea,* 381 U.S. 676, the method of analysis consistently utilized in the independent contractor cases (which were cited and relied upon) was applied to the more general problem of determining when a union agreement with non-labor groups qualifies for the labor exemption. In holding that a collective bargaining agreement that restricted marketing hours was intimately related to wages, hours and working conditions and therefore within the labor exemption, this Court looked to the underlying factual predicate for the union's contentions that such restrictions were necessary to protect the working conditions of its members. As in *Jewel Tea,* the legality of the unions' conduct here hinges, in the final analysis, on the factual support for the unions' contentions that the regulations are necessary to protect the job standards of their employee-members. And, as in *Jewel Tea,* the factual findings support those union contentions.

This Court declared in *Jewel* that, "(t)he crucial determinant is not the form of the agreement—e.g. prices or wages—but its relative impact on the product market and the interests of union members." 381 U.S. 676, 690, n. 5. Yet the Court of Appeals here placed ultimate reliance on the "form" of the unions' actions—"price-fixing"—and ignored their impact—the loss of jobs and the reduction of wages. In so doing, it abandoned the search for economic reality that has been the hallmark of this Court's decisions and condemned union activities that this Court has specifically approved.

The union activities here involved are identical to those in *Oliver*. And the Court of Appeals here, like the Ohio courts in *Oliver*, failed to recognize that the unions must fix the minimum price for the total contribution made by the competing working employer in order to effectively preserve the working conditions of its employee members. For the union's wage scale will mean nothing if the employer who does the same work as his employee absorbs the cost of any part of that contribution. The "form" of the unions' regulations therefore can be no more controlling here than it was in *Oliver*.

If the economic predicates for the unions' conduct are appreciated, the legality of that conduct under the antitrust laws is clear under each of the various methods for appraising union conduct that this Court has utilized;

(1). In *Apex Hosiery v. Leader*, 310 U.S. 469, this Court held that union elimination of "price competition based on differences in labor standards" does not violate the antitrust laws. Here the union, in preventing the leader from reducing his price below the

sum of his own scale wages and all other expenses, is eliminating "price standards based on differences in labor standards." The reasoning of the court below is in sharp contrast to its expressed approval of the right of the unions to compel the leaders into membership because they were in job and wage competition with employee musicians. Since the legitimacy of the unions' interest in compelling the leaders into membership is based on the need to regulate their competition, that holding is irreconcilable with the Court of Appeals' conclusion that the union may not prescribe the minimum which the leader must receive.

(2) Similarly, the existence of job and wage competition compels the conclusion that the unions have not violated the antitrust laws because they have not combined with a non-labor group. Since this Court's historic decision in *United States* v. *Hutcheson,* 312 U.S. 219, it has been clear that the antitrust laws do not apply "(s)o long as a union acts in its self-interest and does not combine with non-labor groups. . . ." 312 U.S. at 232. The Court of Appeals agreed with the District Court's conclusion, based on its findings of job and wage competition, that the unions here had not combined with a non-labor group. Ignoring the significance of the fact that the unions in *Jewel Tea* v. *Meat Cutters, supra,* had combined with a business enterprise (patently a non-labor group), it believed, however, that *Jewel Tea* established a "narrower ground on which the unions' activities must be tested", even where the union acts unilaterally. In so doing, it failed to follow the undisturbed holdings of this Court that a union does not violate the antitrust laws where it acts alone and not in combination with business groups.

(3) Finally, since the union provisions regulating the job and wage competition of the leaders deal with a

mandatory bargaining subject, they are immunized from antitrust liability for that reason as well. In *Teamsters Union* v. *Oliver, supra,* this Court held that union actions indistinguishable from those of the unions in this case dealt with a mandatory subject of bargaining. The Court of Appeals assigned no persuasive reason for its failure to follow *Oliver* but contented itself with the unsupportable *ipse dixit* that the situations were not "at all comparable". Moreover, in stating that there was no authority holding that an employer must bargain on a union's demand that he not perform the work of an employee, the Court of Appeals overlooked a decision of the National Labor Relations Board precisely in point. *Crown Coach Corp.,* 155 NLRB 625, 628. The majority's error lay, however, not in its overlooking a Labor Board decision, but in its failure to grasp the essence of this Court's decision in *Oliver*—that whether a provision deals with a mandatory bargaining subject depends upon its impact on employee standards. Since this Court and the Labor Board have both declared varying union methods to protect jobs direct labor concerns, both logic and policy reject the notion that a union's effort to regulate the job and wage competition of working employers is not a mandatory subject of bargaining.

II

Where the leader does not perform, union establishment of a minimum price for the engagement raises a different and concededly more troublesome issue. However, the record evidence demonstrated and the District Court found that ". . . skimping on the part of the person who sets up the engagement so that his costs are not covered is likely to have an adverse effect on

the fees paid to the participating musicians." Because of the singular nature of employment relationships in this field, there is a direct, rather than an indirect, relation between the price received and the wages paid to the employees. Moreover, the selection of the musicians who will perform is itself a musical service for which the union may insist that the leader receive remuneration. Indeed, it is in recognition of this fact that the leader receives additional compensation in those fields in which he is clearly an employee. For these reasons, union regulation of the amount the leader charges, even where he does not perform, is immunized from the antitrust laws by reason of the labor exemption.

III

The various practices challenged in No. 310 are lawful and the courts below were clearly correct in sustaining their legality. Since leaders are in job and wage competition with employee musicians, it is lawful for the unions to admit them to membership and even to compel them to be members. *Meat Drivers* v. *United States, supra; Milk Wagon Drivers* v. *Lake Valley Farm Products,* 311 U.S. 91. The provisions of § 8(b)(4)(A) of the National Labor Relations Act cannot affect the legality of these practices under the antitrust laws. The unions' insistence on a closed shop concerns a "term or condition of employment" and is therefore exempt from the antitrust laws. *United States* v. *American Federation of Musicians,* 318 U.S. 741, *affirming* 47 F.Supp. 304 (N.D. Ill.). Establishment of minimum employment quotas, since intended to enhance job opportunities, likewise comes within the labor exemption to the antitrust laws. *United States* v. *American Federation of Musicians, supra; United States* v. *Car-*

rozzo, 37 F. Supp. 191 (N.D. Ill.), *affirmed,* 313 U.S. 539. The unions' refusal to bargain is not the kind of conduct condemned by the antitrust laws and this Court's decision in *Hunt* v. *Crumboch,* 325 U.S. 821, forecloses plaintiffs' claims. Similarly, the unions' insistence on the use of a form contract simply has nothing to do with the antitrust laws and is a legitimate union requirement. Nor can antitrust liability attach to the unions' attempts to favor the employment of local musicians rather than musicians from outside the jurisdiction. Union protection of local jobs has been a traditional and legitimate concern consistently approved by the courts. Finally, the unions' regulation of booking agents is, as the District Court found, "reasonably related to their interest in maintaining observance of union scale wages and working condition." Indeed, the activities of the booking agents are identical to those performed by unions in other industries and are subject to union rules for that reason.

ARGUMENT

Introduction

This Court has dealt, in a variety of contexts, with the attempts of labor unions to control the activities of independent contractors. Regardless of the manner in which the case arose, however, the Court has always searched for and grounded its decision on the economic objectives and consequences of the union's conduct. If the underlying facts demonstrated that the union activities were designed to protect employee standards from the unfair competition of working employers, the union's conduct has consistently been approved. Whatever the legal or statutory formulation, the basic answer given by this Court has been and remains the

same—a union may seek to regulate job and wage competition by working employers.

Here the protesting orchestra leaders have mounted a blunderbuss attack on long-standing practices by which the American Federation of Musicians and Local 802 have sought to do precisely what this Court has said they could do, i.e., attempt to preserve the job opportunities and wage standards of their members and to preclude unfair competition by working employers. Claiming that they are the employers of musicians on club-date engagements, these particular orchestra leaders have contended that the union regulations which affect them in their status as employers violate the antitrust laws. The District Court correctly directed its inquiry to whether these leaders were in job and wage competition with employee musicians; and having found that such competition existed and having found that the union regulations were legitimately directed toward regulating that competition, the court dismissed the complaints in their entirety. But the Court of Appeals for the Second Circuit, while reaffirming the findings of job and wage competition, invalidated those regulations establishing the minimum compensation of the leaders on club-date engagements. In ignoring its own findings of job and wage competition and predicating its findings of illegality on the label "price-fixing", the Court of Appeals abandoned the search for economic reality that has been the hallmark of this Court's decisions and condemned union activities this Court has explicitly approved.

In its most recent decision concerning the scope of the labor exemption from the antitrust laws, this Court declared that the "crucial determinant" is not the form but the relative impact of the union's actions. *Meat*

Cutters v. *Jewel Tea,* 381, U.S. 676. We shall show first that it was precisely because of its undiscerning reliance upon the form of the union activities involved here that the Second Circuit misapplied the precedents of this Court. And, we shall show, once the economic impetus for the unions' actions—the existence of job and wage competition—is fully comprehended, the decision of the Court below is clearly incorrect under each of the various legal theories this Court has relied upon in assessing the breadth of union antitrust liability. In other words, where a union in fact seeks to ward off unfair competition by working employers, its actions are immunized from antitrust liability because (1) a union may eliminate price competition based on differences in labor standards or (2) because a union may lawfully combine with members of a labor group or (3) because a union demand that a working employer receive a stated minimum is a mandatory subject of bargaining.

The unions' other practices were sustained by the Court of Appeals. To the extent that the plaintiff leaders renew their challenge in this Court, we shall discuss these also;[12] as their legality rests in large part on the same principles as those involved in the basic discussion, or is obvious for other reasons, it will be possible for us to deal with them in fairly short order.

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[12] Plaintiffs' petition for certiorari in No. 310 raises twenty-seven Questions Presented. Many of these are argumentative or raise matters which were not litigated or decided below. It will therefore lend itself to more orderly and intelligible presentation of the matters which are properly here for consideration to follow the opinion of the Court of Appeals and discuss separately the various practices which that Court considered and held lawful. Those issues which are encompassed by the questions presented but which were not decided by the Court of Appeals, are not properly before the Court and the writ of certiorari should be dismissed to that extent. See, *e.g., Mishkin* v. *New York,* 383 U.S. 502, 513-514.

I. THE UNIONS MAY LAWFULLY REGULATE THE LEADER'S MINIMUM INCOME WHEN HE PERFORMS

A. The "Crucial Determinant" is the Job and Wage Competition Between Leaders and Employee-Musicians.

When the leader performs a club-date engagement he is a working musician. Usually he performs an instrument; but even when he only conducts he is performing a musical service. (App. 130) A musician who is the leader on one engagement is more likely than not to be a subleader or only an instrumentalist on the next engagement. (App. 130-131) Even those leaders who may now not act as sidemen began their careers as instrumentalists. Musicians who perform club-dates also compete for engagements in other fields of the music industry, in many of which the leader, though performing the same musical function, is unquestionably an employee. (App. 129) For all these reasons, leaders have from the start been members of the American Federation of Musicians and its locals. Their membership is thus not an artificial or convenient contrivance to shield a group of businessmen from antitrust liability; rather it is the natural association of members of a common calling, who are in constant job and wage competition with each other.

The fundamental purpose of unionism is to regulate such competition among workers, *American Steel Foundries* v. *Tri-City Trades Council*, 257 U.S. 184, 209. Such competition is not abated merely because some of the competing workers may also be regarded as independent businessmen or as the employers of the other workers. Since the leader is clearly in job and wage competition with employee-musicians, the union must regulate his activities. A job sought by a non-leader violinist at wages fixed by the union would only rarely withstand the competition by a

leader who is free to play the violin without charging for his services. As the District Court found (App. 168):

> In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices equal to the total minimum wages of the sidemen and the participating leader. Any cuts by participating leaders of their fees below union minimums or in the price of an engagement below a union minimum equaling the total minimums of the participants puts an obvious downward pressure on the wages of subleaders and sidemen.

It is that competition for jobs which prompts the union, as a matter of economic necessity, to regulate the wages of the working leader; and such regulation is effective only by establishing the minimum price at which the leader may sell his and his sidemen's services.

And it is the presence or absence of such legitimate economic concerns that this Court has looked in its review of union activities regarding independent contractors. Regardless of the precise legal posture of the case, the union's actions have been examined, traditionally and consistently, in the light of the economic realities. Where, as here, the union has sought to protect the job and wage standards of its members from competition by working employers, this Court has held the union's conduct lawful.

The problem first arose in this Court in *Senn* v. *Tile Layers' Union,* 301 U.S. 468. There a union picketed an employer to require him to sign a union contract,

which he refused to do because it would have required him to cease working at the trade in his own shop. The Wisconsin courts, holding this to be a labor dispute under the Wisconsin labor code, refused to enjoin the picketing. Though the precise holding of this Court was therefore quite narrow (that Wisconsin had not denied the employer due process of law) Justice Brandeis significantly said for this Court (301 U.S. at 481):

> The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. Compare *American Steel Foundries* v. *Tri-City Central Trades Council, supra,* 257 U.S. 184, 208, 209.

Similarly in *Milk Wagon Drivers' etc.* v. *Lake Valley Farm Products,* 311 U.S. 91, this Court looked to the economic motivation of the union's actions to determine whether there was a "labor dispute" under the Norris-LaGuardia Act. Drivers employed by dairies under union contracts had lost their jobs because their employers were being undersold by other dairies who sold milk to independent vendors who owned and operated their own trucks and in turn sold the milk to previous customers of the union dairies. The union believed that the dairies who used the vendor system were able to sell milk at lower prices than the union dairies because "the vendors worked long hours, under unfavorable working conditions, without vacations, and with very low earnings." 311 U.S. 95. Accordingly, it picketed and engaged in other activities to force the vendors into their union, where they would be forbidden to handle the milk as vendors. This Court unanimously held the controversy to be a "labor dis-

pute" within the meaning of the Norris-LaGuardia Act, holding:

> Whether rightly or wrongly, the defendant union believes that the "vendor system" was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no "labor dispute," is to ignore the statutory definition of the term; *to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's effort to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife.* (311 U.S. at 98-99; emphasis supplied.)

Thus, as long as the activity of the union was directly related to preserving wages and working conditions of its members, there existed a "labor dispute" within the meaning of the Norris-LaGuardia Act. And the Court found that relationship present because the vendors were in job and wage competition with the union's members.

Although arising in the context of whether the application of state antitrust laws to a union contract was preempted since a mandatory subject of bargaining under the National Labor Relations Act, *Teamsters Union v. Oliver,* 358 U.S. 283, is particularly significant here since the union practices approved there were analytically indistinguishable from those in the present case. In *Oliver,* this Court sustained the validity of a collective bargaining agreement which fixed the minimum rental which carriers were required to pay for trucks leased from owners who themselves

drove the trucks. The Ohio courts had held this provision to be a violation of the state antitrust law and unprotected by the National Labor Relations Act because it was but a "remote and indirect approach to the subject of wages."

Holding that the disputed clause was a mandatory bargaining subject, this Court reversed (358 U.S. at 293):

> The text of the Article and its unchallenged history show that its objective is to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs. This is thus but an instance, as this Court said of a somewhat similar union demand in another case, in which a union seeks to protect lawful employee interests against what is believed, rightly or wrongly, to be "a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91, 98, 99."

Meat Drivers v. *United States*, 371 U.S. 94, synthesized the rulings of this Court in the phrase "job and wage competition." There it was held that unions may not regulate the activities of independent contractors in the absence of job and wage competition with workers. This was a civil antitrust action by the United States against a union which had taken into membership, as a separate local, a group of businessmen, who bought grease from various sources and sold it to processors; the earnings of these grease peddlers depended on the difference between the prices paid and received for the grease. The union fixed those prices at

which peddlers bought and sold the grease, and allocated accounts and territories. Violation of these conditions was punished by expulsion from the union, which effectively put the expelled peddler out of business because of union strikes and boycotts against processors who dealt with non-union peddlers. The processors, also obtained grease directly from restaurants, hotels and other institutions; in these transactions they picked up the grease from the selling institution through employee drivers who were members of the defendant union.

But, as this Court described it: (371 U.S. at 98):

> There was no showing of any actual or potential wage or job competition, or any other economic interrelationship, between the grease peddler and the other members of the union. It was stipulated that no processors had ever substituted peddlers for employee-drivers in acquiring restaurant grease, or had ever threatened to do so. The stipulation made clear that the peddlers and the processors had essentially different sources of supply and different classes of customers. Based on these stipulated facts, the District Court affirmatively found that "there is no competition between (the employee and peddler) groups because each is engaged in a different line of work * * *.

Since the stipulated facts established that the union's actions were not directed to protecting any legitimate union concern, the Court in *Meat Drivers* held that there was no "labor dispute" within the meaning of the Norris-LaGuardia Act. As in *Columbia River Packers* v. *Hinton,* 315 U.S. 143, the union was seeking to regulate only the "sale of commodities" and, therefore, dissolution was consistent with the Norris-LaGuardia Act.

The Court was, however, most careful to spell out the limited scope of its *Meat Drivers* holding: (371 U.S. at 103):

> What has been said is not remotely to suggest that a labor organization might not often have a legitimate interest in soliciting self-employed entrepreneurs as members. Cf. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products,* 311 U.S. 91; *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters* v. *Wohl,* 315 U.S. 769; *Local 24 of Intern., etc.* v. *Oliver,* 358 U.S. 283. And both the Norris-LaGuardia Act and the Clayton Act ensure that the antitrust laws cannot be used as a vehicle to stifle legitimate labor union activities. But here the court found upon stipulated facts that there was no job or wage competition or economic interrelationship of any kind between the grease peddlers and other members of the appellant union. If that situation should change in the future, the District Court will have ample power to amend its decree.

To repeat, *Senn* raised a question of "reasonableness" under the Due Process Clause of the Fourteenth Amendment; *Lake Valley* and *Meat Drivers* involved the meaning of "labor dispute" in the Norris-LaGuardia Act; and *Oliver* treated with the scope of mandatory subjects of bargaining under the National Labor Relations Act. Thus in whatever context the issue of union regulation of independent contractors has arisen, this Court has undeviatingly based judgment on the underlying economic reality of job and wage competition, rather than on superficial verbalisms. Eschewing labels such as "independent contractor," "employer," "wages," "prices," "price-fixing," "profits" and "union" the Court in these cases searched out the

economic objective and impact of the challenged actions.[13]

And this was the basic approach of Mr. Justice White in *Meat Cutters* v. *Jewel Tea,* 381 U.S. 676, 690, n. 5, to the more general problem of determining when a union agreement with non-labor groups qualifies for the labor exemption:

> The *crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members.* Thus in *Teamsters Union* v. *Oliver,* 358 U.S. 283, we held that federal labor policy precluded application of state antitrust laws to an employer-union agreement that when leased trucks were driven by their owners, such owner-drivers should receive, in addition to the union wage, not less than a prescribed minimum rental. Though in form a scheme fixing prices for the supply of leased vehicles, the agreement was designed "to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." *Id.,* at 293-294. As the agreement did not embody a " 'remote and indirect approach to the

[13] Particularly instructive is the Court's explanation of *Oliver* in *United States* v. *Drum,* 368 U.S. 370, 382, n. 26:

> *Local 24 of Inter. Broth. of Teamsters, etc.* v. *Oliver,* 358, U.S. 283, did not, as appellees suggest * * *, hold that owner-operators are in any sense "employees." That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under § 8(d) of the National Labor Relations Act, * * * to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether the owner-drivers were "employees" protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. See *id.,* at 294-295.

subject of wages' . . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract," *id.*, at 294, the paramount federal policy of encouraging collective bargaining proscribed application of the state law. [Emphasis supplied][14]

Consistent with the analysis that the "crucial determinant" is not the form of the union action but its relative impact, Justice White in *Jewel Tea* probed the ultimate factual bases offered in support of the union's contentions that its actions were immunized from the anti-trust laws by reason of the labor exemption. In this Court's view," . . . the dispute between Jewel and the unions essentially concerned a narrow factual question . . . ." 381 U.S. at 694. Since the District Court had resolved those factual questions in the union's favor and its findings were not clearly erroneous, the union's claims that the activities were intimately related with wages, hours and working conditions were sustained.

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[14] Mr. Justice White wrote for only three members of the Court in *Jewel*, and the Court was sharply divided in that case and its companion, *Mine Workers* v. *Pennington*, 381 U.S. 657, with respect to the scope of the labor exemption for union-employer agreements. But the proposition that the Court must look to the underlying realities appears to have been common ground. Thus, Mr. Justice Goldberg approved Mr. Justice White's reliance on the District Court's findings that the issue of market hours affected the employees in self-service markets in reaching the conclusion that it was a mandatory subject of bargaining. See 381 U.S. 676 at 727. And Mr. Justice Douglas, who reached the opposite conclusion, did so in part because he considered the finding on which Mr. Justice White relied to be contrary to "undisputed" evidence, *id.* at 737-738, and in part because of his view of the exemption whereby the critical reality in *Jewel* was the effect of the agreement on competition in the product market, see *id.* at 736-737.

In the instant case, too, the unchallengeable factual findings of job and wage competition between the leaders and employee-musicians[15] compelled the conclusion that the unions' activities were intimately related with wages, hours and working conditions and thereby protected by the labor exemption. Thus, the majority specifically accepted the District Court's findings of job and wage competition between leaders and employee musicians. See (App. 202). Indeed, Judge Anderson elaborated upon what the effect on employee wage standards would be if the union could not regulate the leader's earnings when he performed:

> The establishment of price floors by union fiat may seem to be a different matter, however, when the orchestra leader actually performs with his orchestra. In that situation the services of a subleader would not be required and the leader may

[15] These findings, having been approved by the Court of Appeals are protected here by the settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error:" *Graver Tank and Manufacturing Company* v. *Linde Air Products Company,* 336 U.S. 271, 275; *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635. No "very obvious and exceptional showing of error" can be made with regard to these findings. At the heart of the matter are the District Court's findings that (1) Conducting is a musical service, and a subleader performs all the musical services which a leader would perform if he were present (Findings 32, 36); (2) Each time plaintiffs personally conduct an orchestra they displace the services of a subleader who would otherwise have been engaged to conduct the orchestra (Finding 38); (3) When an orchestra leader performs an instrument he fills a requirement in the orchestra for that instrument just as any sideman does (Finding 44); (4) Each time plaintiffs play an instrument they displace the services of a sideman who would otherwise have been engaged to play the same instrument that the particular plaintiff played (Finding 45). (App. 130-132). These findings are abundantly supported by the evidence cited in their support by the District Court; nor did plaintiffs produce any evidence to the contrary.

> in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader. (App. 199).

Yet, in its next step the Court of Appeals turned away from these critical factual findings and erroneously stated that: "The cases make it clear, however, that price-fixing generally is not a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the anti-trust laws" (App. 199). The Court below thus adopted an approach diametrically opposite from that consistently utilized by this Court. Rather than according the proven factual basis for the unions' actions—the existence of job and wage competition—their full due, Judge Anderson's majority opinion brushed those facts aside on the mistaken notion that "price-fixing" is absolutely impermissible. Thus, irrelevant "form"—"price-fixing"—became the crucial determinant, and critical "impact" was ignored.

The District Court had properly rested its legal conclusions on uncontroverted detailed evidentiary findings of job and wage competition between the leader and employee musicians. The Court of Appeals, though accepting those uncontested findings, wholly misconceived their legal consequences. *Lake Valley, Oliver* and *Meat Drivers* established that the controlling factor in determining whether a union may regulate independent contractors is precisely whether they are in job and wage competition with employees. The Court of Appeals erred because it ignored the economic reality as revealed by the findings on this subject and thus disregarded what *Jewel* declared to be the "crucial determinant."

The fact that Mr. Justice White supported and illustrated his thesis in *Jewel* by reference to *Teamsters Union* v. *Oliver* and the other independent contractor cases is of special significance here. For the economic factors which govern the union's actions are identical to those in *Oliver*. And, even as the Court of Appeals here relied primarily on the characterization "price-fixing", so the Ohio courts in *Oliver* considered that the unions had engaged in "price-fixing" and that such a "remote and indirect approach to the subject of wages" was outside the national labor policy. See pp. 34-35, *supra*.

But this Court's decision in *Oliver* was premised on the realization that the union's wage scales would be subverted unless the owner-operator received a fair price for the lease of his truck. We know and can conceive of no method whereby a union can regulate the wages of a working employer except by fixing the minimum price for his total contribution to his customer. The union's wage scale means nothing if the employer who does the same work as his employee absorbs the cost of any part of that contribution. It was for that reason that the union regulation in *Oliver* came within the protection of the national policy even though it was ". . . in form a scheme fixing prices for the supply of leased vehicles . . ." 381 U.S. at 690, n. 5.

The same considerations apply even more forcefully to the union's concern with performing leaders here. The majority below would prevent the union from requiring the leader to include his own wages in the price he must charge the purchaser—much less the equivalent value of the truck. The fact that Local 802's regulations take the form of a minimum price to

be charged the purchaser of music can be no more controlling here than the fact that the Teamster contract in *Oliver* specified the minimum rental the carrier had to pay.

In sum, if the establishment of a minimum price is considered in light of the economic realities, as found by the courts below, it is clearly lawful. Since it is designed to curb unfair job and wage competition from working employers, it is intimately related to wages, hours and working conditions and therefore exempted from the antitrust laws.

B. Because of Job and Wage Competition, the Regulation of the Performing Leader's Income Is Lawful under This Court's Antitrust Precedents.

Once the economic bases of the unions' conduct are appreciated, any difficulty in assessing the legality of the conduct is removed. Irrespective of the phrasing of the question, the answer is the same—the unions' response to the job and wage competition of the leaders is lawful. Historically, this Court has utilized three separate approaches. Thus, union conduct has been held free from antitrust liability (1) if the union has sought to eliminate price competition based on differences in labor standards or (2) if the union has not combined with a non-labor group or (3) if the subject of the union's concern is a mandatory subject of bargaining. As we shall show, the uncontroverted findings of job and wage competition compel the conclusion under each of these traditional approaches that the union regulations here involved do not violate the antitrust laws.

1. Because of Job and Wage Competition, Regulation of the Performing Leader's Minimum Income Lawfully Eliminates Price Competition Based on Differences in Labor Standards.

In *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, the Court declared that a combination of employees is not illegal though it restrains trade among them in the sale of their services to the employer. The Court found additional support for this holding in § 6 of the Clayton Act which declared that "The labor of a human being is not a commodity or article of commerce * * * nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws". The Court then made the following fundamental pronouncement (310 U.S. at 503-504):

> * * * Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209, *an elimination of price competition based on differences in labor standards is the objective of any national labor organization.* But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. [Emphasis supplied.]

When the leader reduces the price he charges the purchaser of the music below the sum of his own scale wages and his out-of-pocket expenses (including the wages of the sidemen), he is engaged precisely in

"price competition based on differences in labor standards". The differences in labor standards are those between the scale wages of the employee musician with whom he is in job competition, and his earnings for his own labor as a musician, which consist of the price charges, less his out-of-pocket expenses, including the wages of the other musicians.

The economic truth that an independent contractor who works at the trade and charges the purchaser of his services less than the sum of his out-of-pocket expenses and the union wage is competing unfairly by reducing the charge for his own labor has been fully appreciated by this Court. This was the very form of competition against which the agreement in the *Oliver* case was directed. If the owner-operator's rental was insufficient to make up his actual costs, he had to make them up from his wages as a driver. It was for that reason that the collective bargaining agreement in *Oliver* was within the national labor policy though in form a scheme for fixing prices. See 358 U.S. at 293, quoted at p. 35 *supra.*

The *Apex* principle did not come into play in *Meat Drivers* v. *U.S., supra,* because the grease peddlers were not in job competition with employee drivers, and therefore could not have affected the latter's wage standards. Accordingly, their allocation of markets and fixing of prices was a pure and unconcealed violation of § 1 of the Sherman Act.

But as we have emphasized, this Court in *Meat Drivers* took pains to reaffirm the right of unions to solicit self-employed entrepreneurs as members. 371 U.S. at 103, quoted at p. 37 *supra.* In the present case the Court of Appeals correctly understood that *Meat Drivers* protects the right of defendant unions

to compel leaders into membership because there is job and wage competition between them and employee musicians. (App. 202). But it failed to comprehend the basic significance of *Meat Drivers* when it struck down the regulations which determined what the leader must earn for his labor. The "legitimate interest" which unions were acknowledged to have "in soliciting self-employed entrepreneurs as members" is precisely the power to control their impact on labor standards. This is the point of the citation in *Meat Drivers* of *Oliver* and *Lake Valley*. *Oliver* was concerned exclusively with controlling such impact;[16] in *Lake Valley*, membership and regulation were intertwined: "There are few instances of attempted unionization in which a change to union membership would not require some alteration in the conditions or terms of employment. Union membership contemplates change—change which it is believed will bring about better working conditions for the employees. * * *." 311 U.S. at 98.

Union membership *per se* can never be a violation of the antitrust laws. To say that a union may lawfully admit persons into membership would thus be a sterile truism unless this right carries with it the right to achieve the objective of any union—"the elimination of price competition based on differences in labor standards." *Apex, supra*, at 503.[17] That portion of the Court of Appeals decision which correctly affirmed the

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[16] Oliver was a union member, but this fact did not figure in the Court's decision.

[17] *Mine Workers* v. *Pennington*, 381 U.S. 657, reaffirmed the principle of *Apex* "that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." 381 U.S. at 666.

unions' right to compel leaders into membership is irreconcilable with its holding that the union may not prescribe the minimum which the leader must receive when he performs.

2. Because of Job and Wage Competition, There was no Combination Between the Unions and a Non-Labor Group.

In *United States* v. *Hutcheson,* 312 U.S. 219, the Court inaugurated a different approach to the problem of antitrust liability of union activities. While not disturbing *Apex,* which was cited with approval, *id.* at 236, it held that "whether trade union conduct constitutes a violation of the Sherman Act is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." It followed therefore that union conduct described in § 20 of the Clayton Act (such as strikes and boycotts, which are the ultimate sanction behind the union's price regulations) cannot be held to be unlawful under the Sherman Act. Moreover, the Court held:

> So long as a union acts in its self-interest *and does not combine with non-labor groups,* the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 312 U.S. at 232 (Emphasis added.)

This proposition remains the law. It was reaffirmed in *Allen-Bradley Co.* v. *Local 3, I.B.E.W.,* 325 U.S. 797, 807, although the Court there made clear that no immunity is available when a union joins a conspiracy of businessmen. See also *Hunt* v. *Crumboch,* 325 U.S. 821, 825; *Mine Workers* v. *Pennington,* 381 U.S. 656,

662. Accordingly, when the leaders here accused the unions of violating the antitrust laws by establishing the minimum price which the leader must charge the purchaser of the music for a club-date engagement, they charged that the unions had combined with orchestra leaders. (App. 10). Therefore, one of the principal issues litigated at the trial of this case was whether such combination existed.

The complaining leaders alleged and sought to prove an *Allen-Bradley* combination on the theory that leaders who operate as they do are "employers" and therefore a non-labor group. (App. 120-123). But Judge Levet rejected this simplistic theory. He reasoned that if such leaders are employees, they "are certainly a labor group"; whereas even if they are employers or independent contractors, they will be a labor group ". . . if they meet the test of job or wage competition or other economic interrelationships. . . ." (App. 163). Thus, while he assumed for purposes of discussion that the leader was the employer in the club-date field, he concluded, on the basis of his findings of job and wage competition, that nevertheless they were members of a labor group.[18]

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[18] The Court of Appeals stated flatly that in the club-date field *all* leaders are employers. This sweeping decision was contrary to the Court's own prior decisions, which distinguished between leaders who never perform as sidemen and the great majority who do perform as sidemen, who were regarded as employees. See *Carroll* v. *A.F.M.*, 316 F. 2d 574, 575, n. 1. Moreover, the ruling went beyond the issues tried in the case, because the plaintiffs' contention was that only they and the relatively few leaders who perform as they do are employers. See the issues framed by the Court in its Pre-trial Order, Par. 8 (a)-(f) and 8 (1). (App. 120-122) However, because we are convinced that the union's regulations are lawful regardless of the leaders' status, we shall not add to this already long brief by dealing with this additional issue, though it was preserved in our Petition for Certiorari (p. 2, n. 1).

The Court of Appeals agreed that the unions had not combined with a non-labor group. (App. 194-195). It expressly rejected plaintiffs' claim that the present case comes within *Allen-Bradley* v. *Local 3, I.B.E.W.*, 325 U.S. 797. (App. 194-195). By the same token, *Mine Workers* v. *Pennington*, 381 U.S. 656, was found to be inapposite, because, as the majority put it, Pennington "reaffirmed" the *Allen-Bradley* principle. (App. 194). However, the Court of Appeals erroneously believed that *Meat Cutters* v. *Jewel Tea* established a "narrower ground on which the unions' activities must be tested" even where the union acts unilaterally. (App. 195).

But the foundation of this Court's analysis in *Jewel Tea* was that the union had entered into an agreement or "combination" with the Jewel Tea Company, a business enterprise which obviously could not qualify as a labor group. No one claimed or could claim that *Jewel Tea* was in job and wage competition with union members. The Court of Appeals acknowledged this fundamental difference in conceding that the unions' protective provisions here do not, as did those in *Jewel Tea*, "appear in agreements with employers." (App. 196). Instead, as the majority recognized, "They are unilaterally adopted by the unions and complied with by the Orchestra leaders. . . ." *Id.*

Having noted the essential difference between this case and *Jewel Tea*, the Court of Appeals then ignored its significance on the erroneous notion that the policy considerations are the same. (App. 196). There is simply no support in any of the decisions of this Court for the proposition that similar considerations apply where the union has not combined with a non-

labor group.[19] The Court of Appeals' view is therefore squarely contrary to the undisturbed holding in *Allen-Bradley* "that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups", 325 U.S. at 810. This Court had long anticipated—and rejected—the theory of the court below that unilateral union action must, on policy grounds, be subject to the same restrictions as union-employer agreements:

> This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. *Id.*

See also *Hunt* v. *Crumboch*, 325 U.S. 821, 824-825. And it will be recalled that this Court in *Allen-Bradley* directed that the injunction that the District Court had entered "be amended so as to enjoin only those activities in which the union engaged in combination with any person, firm or corporation which is a non-labor group * * *. Without such a limitation, the injunction runs directly counter to the Clayton and the Norris-LaGuardia Acts." 325 U.S. at 812. So does the Court of Appeals' holding that defendants may not establish a minimum price for the performing leader.

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[19] The Fifth Circuit has had no such misconception: "Our reading of the Supreme Court decisions in *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 and the more recent cases of *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 and *Local Union No. 189, Amalgamated Meat Cutters, etc.* v. *Jewel Tea Co.*, 381 U.S. 676 convinces us that in order for union activity to constitute a violation of antitrust laws in the circumsta. es here presented, there must be a combination of union and non-union business groups to create a monopoly, resulting in a restraint of trade or interstate commerce. *Cedar Crest Hats* v. *United Hatters*, 362 F. 2d 322, 326.

3. Because of Job and Wage Competition, Regulation of the Performing Leader's Minimum Income Deals with a Mandatory Bargaining Subject.

Having held that the union regulations here must be judged as if they were union-employer agreements, the majority below declared the sole test to be whether the union regulations deal with a mandatory subject of bargaining within § 8(d) of the National Labor Relations Act.[20] And because the majority concluded that the price which the performing leader must charge the purchaser of the music is *not* such a subject, it held the regulation to be unlawful under the antitrust laws. Since the decisions of this Court make clear that such union demands *are* mandatory bargaining subjects, the Court of Appeals erred even under its own highly questionable test.

This question is controlled by *Teamsters Union* v. *Oliver,* 358 U.S. 283. For there, the precise issue was whether provisions in a collective bargaining agreement that fixed the minimum rental an owner-operator might charge dealt with a mandatory subject of bargaining. This Court held that they did:

> The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles

[20] The majority derived this notion from Mr. Justice White's opinion in *Meat Cutters* v. *Jewel Tea.* We believe, as did Judge Friendly, that it seriously misunderstood *Jewel* in this regard and moreover that this misreading encompasses a too restrictive view of the labor exemption. However, for the reasons stated in the text, the regulations in this case can easily be sustained even under the too confining test declared applicable by the court below.

from service. *Cf. Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters* v. *Wohl,* 315 U.S. 769. It is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining, *cf. National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, to hold, as we do, that the obligation under § 8(d) on the carriers and their employees to bargain collectively "with respect to wages, hours, and other terms and conditions of employment" and to embody their understanding in "a written contract incorporating any agreement reached," found an expression in the subject matter of Article XXXII.

We have already demonstrated the precise economic parallel between the owner-operator provisions in *Oliver* and the establishment of a price floor for the performing leader. (pp. 42-43, *supra*)

It was, however, precisely in its failure to follow the underlying economic analysis of this Court in *Oliver* that the Court of Appeals erred. For that reason, we shall set forth its discussion of *Oliver* in full.

The cases make it clear, however, that price-fixing generally is not only not a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the antitrust laws. The unions assert that in this case the price-fixing is essential to the mandatory subject of job protection, as it was in *Local 24* v. *Oliver, supra;* but in that case the union members were faced with the probability that, if a particular minimum price were not charged as rent by the owner-operators of the vehicles, the employee-drivers, who were members of the union would have to accept substandard wages or see their jobs entirely "contracted out" by the em-

> ployer. The circumstances constituting a possible threat to the employment of subleaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performance with their orchestras enhance the demand for the orchestra and provide more work for employees rather than less as is the case of "contracting out." See *Fibreboard Paper Products Corp.* v. *N.L.R.B., Supra,* at pp. 220-225 (Stewart, J. Concurring). (App. 199).

We submit that this reasoning is unsound in several respects. To begin with, the court's *ipse dixit* that the situation is not "at all comparable" to that in *Oliver* is inconsistent with the Court's own statement earlier—based on the finding of the District Court—that if the leader does not charge the prescribed minimum, "He could make the services of his orchestra available at a lower price than could a non-performing leader." (App. 199). But the leader can do this, as the Court recognized, only by displacing the sub-leader and "... in this way sav(ing) the wages he would otherwise have to pay." And, there is neither evidence nor logic to support the Court of Appeals' assumption that leaders "enhance the demand for the orchestras and provide more work for employees rather than less." The record shows an abundance of competition among leaders of no particular fame to provide music which the purchaser has planned,[21] and no evidence that as

[21] This includes competition between leaders like plaintiffs and other leaders, like witness Stevens, who frequently also perform as sidemen and do not have their independent businesses.

much as one club-date engagement has ever taken place because a leader created the demand. The demand for music at weddings is created by the couple's decision to marry and not by any leader's skill or reputation.[22]

Moreover, the Court of Appeals wrongly stated that there is no authority holding that an employer must bargain on a labor union's demand that he perform no work himself which an employee could do. We note that this is not what the regulations here provide; rather, they establish the terms under which the employer can work at the trade. So understood, the situation is identical to that in *Oliver*.

But even on the Court's own terms, its statement is inaccurate. There *is* authority that a union demand

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[22] Even under the mistaken view that leaders create jobs, Mr. Justice Stewart's concurring opinion in *Fibreboard Paper Products Corp.* v. *Labor Board*, 379 U.S. 203, 215, would not support the Court of Appeals' position. We submit that they attribute to that opinion a narrower view of the scope of mandatory bargaining than Justice Stewart took. The concurring justices agreed that subcontracting was a mandatory bargaining subject under the facts in *Fibreboard* because "all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer". 379 U.S. at 224. A provision which forbids an employer from performing employee functions qualifies precisely under this test since it substitutes "one group of workers for another to perform the same task." It in no way impinges upon those entrepreneural decisions which Justice Stewart thouught to be outside the areas as to which employers could be required to bargain, 379 U.S. at 223-224. Moreover, it is, of course, the majority opinion in *Fibreboard* which is the governing precedent. The Court there held that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d)". 379 U.S. at 214. And in reaching this result, the Court, not surprisingly, followed *Teamsters Union* v. *Oliver*, 358 U.S. 283.

that supervisory personnel not perform employee work is a mandatory subject of bargaining. *Crown Coach Corp.* 155 N.L.R.B. 625, 628. If a union's effort to protect employee jobs from competition by his alter ego is a mandatory subject of bargaining, it is unthinkable that the result should or would be otherwise when the competition is from the employer himself.

The really significant error of the Court of Appeals is not, however, that it overlooked a decision of the National Labor Relations Board, nor even its assumption that a provision can be rendered unlawful under the antitrust laws by the fortuitous absence of affirmative prior authority holding it to be a mandatory subject of bargaining. The Court's pervasive error, as we have already explained, is its failure to appreciate the essence of the *Oliver* decision: that in determining whether a provision deals with a mandatory bargaining subject a court should not examine it in isolation but must determine whether, in light of all the circumstances, it affects legitimate union interests, that is, labor standards. Since the impact of a demand that an employer not perform work which can be done by his employees is to protect the employees' jobs, there is abundant authority that it deals with "wages, hours and other conditions of employment" within § 8(d) of the National Labor Relations Act. The National Labor Relations Board has held, with judicial approval, that subcontracting,[23] union hiring halls[24] and union

[23] *Fibreboard Paper Products* v. *Labor Board*, 379 U.S. 203.

[24] *N.L.R.B.* v. *Houston Chapter, Associated General Contractors of America, Inc.*, 349 F. 2d 449 (C.A. 5), *cert. denied*, 382 U.S. 1026; *N.L.R.B.* v. *Tom Joyce Floors, Inc.*, 353 F. 2d 768 (C.A. 9); *cf. Teamsters Local* v. *Labor Board*, 365 U.S. 667, 676-677.

security[25] are all mandatory subjects of bargaining. What these provisions have in common is that they all seek to protect the job opportunities of employees represented by the union, whether it be against the employees of other employers, of employees hired by means over which the union has no control or of employees who are members of some other union or no union at all. If such provisions come within the phrase "wages, hours and other terms and conditions of employment", why should not protection of job opportunities against competition from the employer himself qualify?

Moreover, the phrase "wages, hours and other terms and conditions of employment" in § 8(d) of the National Labor Relations Act is closely related to the definition of "labor disputes" in § 13 of the Norris-LaGuardia Act as including "any controversy concerning terms, tenure or conditions of employment * * *".[26] This Court has held controversies to be labor disputes where the objective was to secure job opportunities against workers of other nationalities[27] and races,[28] or members of other unions[29] or of no unions at all.[30] Logic—and the policies of the antitrust and labor laws—repel the notion that a union may

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[25] *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 154, (C.A. 7); *N.L.R.B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134 (C.A. 9), *cert. denied* 338 U.S. 827.

[26] *Fibreboard Paper Products Corp. supra*, 379 U.S. 203, 210, relying on *Order of Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330.

[27] *Marine Cooks* v. *Panama S.S. Co.* 362 U.S. 365.

[28] *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552.

[29] *United States* v. *Hutcheson*, 312 U.S. 219.

[30] *United States* v. *A.F.M.*, 318 U.S. 743.

protect employees from competition from other workers in any of the classes covered by the cited cases, or from inanimate technological devices,[31] but that they are forbidden to preserve the same jobs from the competition of the employer himself. And what logic and policy reject, law does not require.

We believe that as long ago as in *Senn* v. *Tile Layers Union,* 301 U.S. 476,[32] this Court made clear that a union's concern with job competition from working employers is both direct and legitimate. In any event, however, the decision of this Court in *Oliver* is controlling and contemporary authority for the proposition that such union concern is so intimately related to wages, hours and working conditions as to be a mandatory subject of bargaining and to qualify for the labor exemption to the antitrust laws.

II. THE UNION'S REGULATIONS OF THE NON-PERFORMING LEADER INCOME ARE LAWFUL

Establishment of a minimum price for the engagement when the leader does not perform raises a different and concededly more troublesome issue. For when the leader does not perform, he is not displacing an

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[31] *United States* v. *A.F.M., supra; United States* v. *International Hod Carriers, etc.,* 313 U.S. 539.

[32] That case involved a controversy over whether an employer should be permitted to work at the trade was held to be a "labor dispute" under the Wisconsin Labor Code. At the very next Term this Court declared that the definition of "labor dispute" in the Norris-LaGuardia Act "does not differ materially from that above quoted from the Wisconsin Labor Code * * *" *Lauf* v. *E. G. Shinner & Co.,* 303 U.S. 323, 329. In *Lauf,* the Court also said that the controversy there—a strike for the closed shop—is "indistinguishable" from that in *Senn. Id.* at 328. Such a controversy was held to be within the Norris-LaGuardia definition in *Lauf* and in *United States* v. *A.F.M.,* 318 U.S. 741. See p. *infra.*

employee-musician. But the record shows and the District Court found, that there is another aspect to the economics of the club-date field which makes it necessary for the union to insist that the leader charge the minimum prescribed by the regulations in order to preserve the scale of the employee-musicians.

When the leader does not collect from the purchaser of music an amount sufficient to make up the total of his out-of-pocket expenses, including the sum of the scale wages of the sidemen he will, in fact, not pay the sidemen the prescribed scale. As one of plaintiff's witnesses put it, in response to a question by the court, "If the leader couldn't get scale he couldn't pay the sidemen's scale." (App. 61b). And leader Stevens testified:

> Q. Have there been occasions in the past, when you were a leader bidding on a job, when you submitted a bid which was below the union's minimum price? A. Not in the last six or seven years.
>
> Q. More than six or seven years ago, approximately six or seven years ago did you submit such a below scale bid? A. Yes.
>
> Q. On such occasions were you paying your side men below scale? A. Yes. (App. 245b)

See also App. IV-1199; 44b. Indeed, in a letter signed by plaintiff Carroll under the letterhead of "Orchestra Leaders of Greater New York," originally a plaintiff in this case, it was stated:

> "The failure by the Union to insist upon all leaders conforming with the law has resulted in unfair competition and very often, underscale conditions. Many sidemen who are receiving the Union scale as well as those who are working underscale are losing the Social Security and other benefits." (App. 418b.)

Accordingly, the District Court found:

> It is unquestionably true that skimping on the part of the person who sets up the engagement so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians. By fixing a reasonable amount over the sum of the minimum wages of the musicians participating in an engagement to cover these expenses, the union insures that "no part of the labor costs paid to a * * * [leader] would be diverted by him for overhead or other non-labor costs." *Greenstein* v. *National Skirt & Sportswear Ass'n, Inc.*, 178 F. Supp. 681, 689 (S.D.N.Y. 1959) (App. 170).

Given these findings, based on uncontradicted evidence, enforcement of a minimum price (based on his out-of-pocket expenses) when the leader does not perform, operates *in fact* to prevent him from competing with other leaders by reducing employee wage standards. *Apex* holds that the elimination of such price competition is not forbidden by the Sherman Act. This is not a case, as was *Allen-Bradley,* where the unions are concerned with the employer's income in the expectation that his general prosperity will enable him to provide more jobs and better wages for its members. Here the unions are acting not on the expectation that the employer's profits will trickle down to his employees; rather their action is based on their experience that unless the total scale wages flow into the leader's pocket from the purchaser of the music, they will not flow from the leader to the performing musicians. In those industries where employment is not casual, where the employer has made a capital investment and has a relatively stable, fixed labor force, a reduction in the price to his customers will not usually have a direct and automatic impact on wage

standards. But here the employees are hired to perform only a single, particular job of a few hours duration and not until the employer has already secured the engagement from the customer. If he fails to charge the customer an amount equal to the employees' wages, the musicians are not likely to—and frequently do not—receive their full wages. In this field, in contrast to what occurs where employment is stable, the effect on wages is direct and immediate. As *Apex* makes clear, the Sherman Act does not command that competition among entrepreneurs be preserved by destroying the wage standards of labor.

The analysis of *Meat Cutters* v. *Jewel Tea, supra* is likewise pertinent here. The court did not hold in *Jewel* that an agreement respecting marketing hours would always come within the labor exemption. Rather, it held that such an agreement was lawful because it was found that the marketing hours restriction had a substantial effect on hours worked by the union members. So it is with the regulation of the price which an entrepreneur must charge to his customers. In many cases, an agreement regarding this price will fall outside the labor exemption. But where the evidence demonstrates and the Court finds—as here—that the minimum which the union fixed is necessary to assure that the scale wages will actually be paid to the performing musicians, it comes within the labor exemption.

The requirement that the nonperforming leader obtain a certain minimum fee is justified also, as Judge Friendly observed, because the selection of the musicians to perform the engagement is itself a musical service for which the union may insist that the leader receive remuneration. (App. 205-206). For that reason

the union's contracts with broadcasters, recording companies and symphony orchestras provide that on each engagement there shall be an employee—that is a leader—who will perform this function and receive double scale therefor. The parties stipulated that:

> The almost undeviating practice for at least 65 years, both for single and steady engagements has been for orchestra leaders to receive as minimum compensation for their services double the wages of sideman. This practice also applies to the rendition of services by leaders in such diverse areas as television, radio, phonograph recordings, motion pictures, symphony orchestras, night clubs, hotels, opera companies and theatres.[33]

No reason appears to us—and none appeared to Judge Friendly—why the leader should not be similarly compensated for his services on club dates.

III. THE PRACTICES CHALLENGED IN NO. 310 ARE LAWFUL

A. Compelling Leaders To Be Union Members

Since leaders are in job and wage competition with employee musicians who are members of defendant unions, the union's right to admit them into membership is clear. This was settled by this Court in *Meat Drivers* v. *United States,* 371 U.S. 94, 103, which was followed on this issue by the Court of Appeals (App. 202). As we have shown (pp. 45-47 *supra*), the Court of Appeals erred in failing to recognize that the same statutory policies which preserve the unions' right to have the leaders as members authorizes them to accomplish the purpose of bringing them into the union—to regulate their job competition with its employee members.

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[33] (Stipulated Fact 19, App. 104-105).

Plaintiffs assert, and the courts below found, that the unions compel leaders to be members. It is of course true that in *Meat Drivers* the Court said only that the union has a right to "solicit" competing, self-employed entrepreneurs as members. But whether membership is voluntary or involuntary does not affect the result under the Sherman Act. This is clear from the citation in *Meat Drivers* of *Lake Valley* where the vendors were compelled to join defendant union against their will. Plaintiffs point to § 8(b)(4)(A) of the National Labor Relations Act which makes it unlawful for a union by certain means to compel employers or self-employed persons to join a labor union, and claim that this requires disapproval of what they erroneously term the *"dictum"* of *Meat Drivers*. Pet. for cert. No. 310, p. 20. but § 8(b)(4)(A) of the National Labor Relations Act cannot affect the result under the Sherman Act, precisely because it amended neither the Sherman Act nor the Clayton Act. Nor did it change the definition of "labor dispute" in the Norris-LaGuardia Act. Of course, these laws and the National Labor Relations Act must be read together, but a significant element of the policy of the National Labor Relations Act is its scheme of remedies. See, *e.g., San Diego Unions* v. *Garmon,* 359 U.S. 236, 243, 247; *Liner* v. *Jafco,* 375 U.S. 301, 307; *Teamsters Union* v. *Morton,* 377 U.S. 252, 260-261. And the history of the Taft-Hartley Act demonstrates, as this Court recognized in the *Morton* case, that Congress deliberately eschewed application of antitrust sanctions to those union activities which it chose to make unlawful by the 1947 amendments. *Id.* Thus, whatever effect those amendments may have on the rights of the unions to compel leaders into membership, rendering them subject to the range of sanctions under the Sherman Act was not one of them.

B. The Closed Shop

Plaintiffs complain that the unions "monopolize" the music industry by insisting that all professional musicians become members of the union. We think it is obvious that this is not the type of monopolization with which Congress was concerned in Sections 1 and 2 of the Sherman Act. The closed shop is not the monopolization "of any part of the trade or commerce among the several states," but rather a monopolization of job opportunities. *Apex Hosiery* v. *Leader,* 310 U.S. 469, 502-503. Additionally, as the Court of Appeals also recognized, a closed shop dispute concerns a "term or condition of employment", and therefore is exempt from the antitrust laws. The point was squarely decided adversely to plaintiffs in *United States* v. *American Federation of Musicians,* 318 U.S. 741, *affirming* 47 F. Supp. 304 (N.D. Ill.) *Cf. Lauf* v. *E. G. Shinner & Co.,* 303 U.S. 323. Here again, the proscription of the closed shop in the Taft-Hartley amendments to the National Labor Relations Act cannot affect the result under the Sherman Act.

C. Establishment of Minimum Employment Quotas

Plaintiffs also complain that defendants violate the Sherman Act by imposing minimum numbers of men as requirements for various types of engagements. The purpose of these minimums is, of course, to enhance job opportunities, which is an objective that the Sherman Act does not forbid, and which comes within the labor exemption because it is a "labor dispute" within the meaning of the Norris-LaGuardia Act. Both courts below correctly held that this issue is controlled in the unions' favor by *United States* v. *A.F.M., supra* and *United States* v. *Carrozzo,* 37 F. Supp. 191, (N.D. Ill.) affirmed, 313 U.S. 539.

D. Failure to Bargain with Leaders

Plaintiffs contend that the unions violate the antitrust laws by their historic practice not to bargain with orchestra leaders with respect to club-date engagements. The short answer to this claim is that a refusal to bargain by itself is not an agreement in restraint of trade, does not monopolize a market, or in any other way come within the range of activities prohibited by the Sherman Act. Here again, therefore, there is no necessity to look to the labor exemption. However, even if the other elements of a Sherman Act violation were made out, *Hunt* v. *Crumboch,* 325 U.S. 821 would foreclose plaintiffs' claim, as the court below correctly held. Plaintiffs apparently acknowledge this, but urge that *Hunt* should be overruled, pointing to Section 8(b)(3) of Taft-Hartley Act which makes it an unfair labor practice for a union which is the representative of employees to fail to bargain collectively with an employer. For the reasons stated earlier, this change in the National Labor Relations Act could in no event expand the liabilities of unions under the antitrust laws.[34]

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[34] We should also point out that plaintiffs' implicit premise that the unions are in violation of Section 8(b)(3) is erroneous. The only conduct shown by the record is that Local 802 establishes the scale without bargaining, but by vote of the membership, or, pursuant to delegation, by the Executive Board. But such conduct, standing alone, does not constitute a violation of § 8(b)(3). Rather, it is an exercise of rights protected by § 7 of the National Labor Relations Act, as the National Labor Relations Board has held in a case involving plaintiff Cutler. *Associated Musicians of Greater New York, etc.,* 164 NLRB No. 8.

E. The Form B Contract

The Form B contract, which leaders are required to use on engagements with the purchaser of the music,[35] states the terms and conditions of the engagement, and must be filed with the local union in whose jurisdiction the engagement is to be performed. One of the conditions described therein is that the purchaser shall have the right of control over the musicians performing the engagement; it also describes the purchaser of the music as the employer. Plaintiffs allege that the contract violates the antitrust laws, although the basis of their attack is not entirely clear. Plainly, the requirement that the leader give a copy of the contract to the union, so that the union can know which employee musicians are performing the engagements and under what conditions is not even remotely within the ambit of conduct which the Sherman Act regulates, and is a legitimate prerogative of the union.[36]

Plaintiffs object most vehemently to the provisions in the Form B contract which vest the right of control in the purchaser of the music, rather than the leader. If, as they insist, the contract is ineffective to vest control and employer status in the purchaser, it is plain that an ineffectual contract provision cannot

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[35] This requirement applies also to engagements such as radio and recordings where the leader is unquestionably an employee. (Findings 86 *et seq.*, App. 144). In practice Local 802 does not require the use of Form B on club dates. Finding 90 (App. 145).

[36] The Court of Appeals, consistent with its view that the unions may not lawfully establish the minimum price which the leader must charge the purchaser of the music, said that "the contract form provided for the club date must, consistent with this decision, omit any provision which would, in effect, constitute price fixing" (App. 201). We agree, of course, that the union could not use the contract to police the maintenance of any illegal condition.

constitute an independent restraint of trade in violation of the Sherman Act.[37] Nor do plaintiffs show how the provision could restrain trade illegally if, as we believe, it does vest the purchaser with the right of control and employer status, at least for some legal purposes. And even if it were judged by the *Jewel Tea* test for union-employer agreements, the provision would be protected by the labor exemption, for it plainly relates to a mandatory subject of bargaining. It is difficult to imagine anything which is more obviously a term and condition of employment than the identity of the employer. A worker may be willing to work for and under the control of A and be unwilling to work for and under the control of B. This is the kind of judgment that persons in all walks of life make continually individually or in concert with others. Indeed, when *Teamsters Union* v. *Oliver* came to this Court for a second time, it was held that a provision in the owner-operator article which provided that all drivers would be regarded as the employees of the carrier, rather than those of the lessee of the truck dealt with a mandatory subject of bargaining. 362 U.S. 605, sustaining § 4 of Article XXXII, which is set forth at 358 U.S. 298-299.

F. Limitations on Traveling Engagements

The District Court found: "Various AFM regulations favor the employment of local musicians rather than musicians from outside the jurisdiction. The principal incentive to employ local musicians is a requirement that 'foreign' musicians be paid higher wages." (App. 175). But it held, and the Court of Appeals

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[37] Nor, of course, could an ineffectual, or sham contract immunize conduct which would otherwise be unlawful under the antitrust laws.

agreed, that this conduct does not violate the antitrust laws. This decision is clearly correct. Although on this issue, there is no decision of this Court squarely in point on the facts, the Courts of Appeal have uniformly held that it is lawful for a union to protect local job standards by imposing limitations on foreign employers and the hiring of foreign workers. Even without reliance on the Norris-LaGuardia Act, the Second, Third and District of Columbia Circuits recognized this to be a right vouchsafed unions by Section 6 of the Clayton Act. *Rambusch Decorating Co.* v. *Brotherhood of Painters,* 105 F. 2d 134 (C.A. 2) *cert. denied,* 308 U.S. 587; *Barker Painting Co.* v. *Brotherhood of Painters,* 23 F. 2d 743 (C.A.D.C.), *cert. denied,* 276 U.S. 631 (1928); *Barker Painting Co.* v. *Brotherhood of Painters,* 15 F. 2d 16 (C.A. 3), *cert. denied,* 273 U.S. 748 (1927). Of course, the cases cited earlier herein, which hold that a union's effort to protect its members against job and wage competition constitutes a labor dispute under the Norris-LaGuardia Act and a mandatory subject of bargaining under the National Labor Relations Act apply equally where the competition is from workers from a different locality. See particularly *Marine Cooks & Stewards Union* v. *Panama Steamship Co.,* 362 U.S. 365, n. 27 *supra.*

G. Booking Agents

The Federation licenses and regulates booking agents, that is, persons who secure engagements and contracts for members. The Federation requires that all booking agents who represent its members enter into a license agreement with the Federation, whereby they undertake not to charge more than a stated maximum commission and not to book orchestras at less than union scale wages and working conditions. See Find-

ngs 115 and 116 (App. 150). The District Court found that these regulations resulted from a report made to the Federation's 1936 convention that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale" (Finding 118, App. 151). The District Court also found that subsequent to the adoption of the regulations governing booking agents these abuses were, "to a large extent," eliminated (Finding 119, App. 151). On the basis of these findings Judge Level concluded:

> Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of defendants, I find that they are in an economic interrelationship with the members of defendants such that the defendants are justified in regulating their activities without contravening the Sherman Act. Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions. (App. 174-175).

The booking agent arranges for the wage of the other members of the orchestra as well as of the leader, and in so doing he performs the identical function which is performed by the union itself in other industries. Due to the history and practices of the entertainment industry, the union must operate through the booking agent on such engagements. We cannot see how the result under the antitrust laws, or the availability of the labor exemption, can depend on whether employee terms are arranged for by a union busineses agent, or by a booker.

Additionally, even if the booking agent is viewed only as the agent as the leader, he is subject to regula-

tion by the union to the same extent as the leader himself. Otherwise the union could regulate the conditions of the engagement when the leader deals directly with the purchaser of the music (as in the great majority of engagements) but would violate the law by regulating it when the leader chooses to use a booking agent. Plaintiffs have pointed to no basis in law or policy which would justify such an anomaly.

Finally, should the booking agent is considered as wholly independent—a wholly unrealistic approach—it would be lawful for the union to prescribe the price for which he may book an engagement. A reduction in that price below union scale can be achieved only by reducing the wages of the musicians performing the engagement. And it is precisely such competition which the Sherman Act does not compel unions to tolerate. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503. See pp. 44-47 *supra.*

H. Caterers

The District Court held that Local 802's regulations which forbid caterers from engaging musicians and which forbid kickbacks from leaders to caterers are lawful. The Court of Appeals found it necessary to decide this question, on the ground that plantiffs have not shown that they were injured by those regulations. But since this case was tried only on the issue of liability, so that plaintiffs did not have the opportunity to show damages, we doubt that would be an adequate basis for rejecting their claims. However, plaintiffs do not press their objections to the regulations in this Court. The only reference to caterers in their Questions Presented is their claim that caterers are on the "non-labor groups" with whom the unions allegedly combine. See Question No. 1, p. 2,

and the incorporation by reference, id. n. 1. The short answer to this claim is that the unions do not combine with caterers at all, by agreement or otherwise. Thus, the premise of the only issue raised in plaintiffs' questions presented with respect to caterers falls, and there is no need to consider the matter further. If, however, the Court believes that the question of the legality of the regulations is properly before it, we urge that they be sustained for the reasons stated by the District Court (App. 175).[38]

[38] The twenty-seventh of plaintiffs' questions presented reads, "Is there a class of orchestra-leader-employers within the meaning of Rule 23 FRCP?" (Petition in No. 310, p. 7). Since plaintiffs do not explain whether they consider all orchestra leaders to be employers, and if so, whether all are in the class they represent, the answer to the question is "No." "In a true class suit the plaintiffs stand in judgment for the class and a judgment for or against the plaintiffs benefits or binds each member of the class personally under the principles of res judicata. The members of the class must, therefore, be capable of definite identification as being either in or out of it." *Giordano* v. *R.C.A.*, 183 F. 2d 558, 560-561 (C.A. 3).

CONCLUSION

By reason of the foregoing, the judgment of the Court of Appeals should be reversed with directions to reinstate the judgment of the District Court dismissing the complaints in their entirety.[39]

Respectfully submitted,

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[39] Even if any of the unions' regulations should be held unlawful, the judgment below could not stand. The Court of Appeals directed the District Court to enter an injunction against defendants in plaintiffs' favor although none has yet shown that he is a "person who [is] injured in his business or property by reason of any unlawful act of defendants," as § 4 of the Clayton Act, 15 U.S.C. § 15 requires. Since the trial of the case on damages was severed from liability, and because the District Court dismissed the complaint in its entirety the plaintiffs are entitled to an opportunity to show injury on remand if they prevail on any of the substantive issues. But they are under no circumstances entitled to an injunction at this time.

APPENDIX

Statutory Provisions Involved

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 provides in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:
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> • • •

Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 17 provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 38 Stat. 738, 29 U.S.C. § 52 provides:

> No retsraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there

is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person, or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104 provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefit or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peacefully to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 13 of the Norris-LaGuardia Act, 47 Stat. 73, 29 U.S.C. § 113 provides:

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation;

or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the court of the District of Columbia.